

7

No. 96-643

Supreme Court, U.S.

FILED

MAY 2 1997

OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1996

THE STEEL COMPANY, a/k/a  
CHICAGO STEEL AND PICKLING COMPANY,  
*Petitioner,*  
vs.

CITIZENS FOR A BETTER ENVIRONMENT,  
*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Seventh Circuit

BRIEF FOR THE PETITIONER

SANFORD M. STEIN  
*Counsel of Record*

LEO P. DOMBROWSKI  
WILDMAN, HARROLD, ALLEN & DIXON  
225 West Wacker Drive  
Chicago, IL 60606-1229  
(312) 201-2000  
*Counsel for Petitioner*

612P

**QUESTION PRESENTED**

Whether, in enacting the citizen suit provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11046, Congress intended to authorize citizens to seek penalties for violations that were cured before the citizen suit was filed, thereby granting EPCRA citizen suit plaintiffs greater enforcement authority than that granted to citizen suit plaintiffs under other federal environmental statutes.

## STATEMENT PURSUANT TO RULE 29.6

The Steel Company, a corporation, has no parent companies or non-wholly owned subsidiaries.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
RULE 29.6 STATEMENT.....	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	3
A. The Structure of EPCRA.....	5
B. Proceedings Below.....	8
SUMMARY OF ARGUMENT.....	11
ARGUMENT .....	14
I. THIS COURT'S INTERPRETATION OF THE CITIZEN SUIT NOTICE PROVISION, EPCRA'S LANGUAGE, AND LEGISLATIVE HISTORY SHOW THAT CONGRESS DID NOT INTEND TO AUTHORIZE CITIZENS TO SUE FOR PAST VIOLATIONS.....	14
A. This Court Has Held That Congress Pro- vided a Notice Period in Environmental Cit- izen Suits to Prompt Either Voluntary Compliance or Government Enforcement..	14
B. The Seventh Circuit Elevated Citizen Plaintiffs to an Enforcement Level Equal to That of EPA, a Result Congress Clearly Did Not Intend.....	20

## TABLE OF CONTENTS - Continued

	Page
C. The Seventh Circuit Ignored the Similarities Between EPCRA and Other Environmental Citizen Suit Provisions .....	25
D. The Seventh Circuit Failed to Appreciate the Differences Between the Clean Water Act, Which Regulates Contamination, and EPCRA, Which Is Solely a Reporting Statute .....	27
II. PRINCIPLES OF STATUTORY CONSTRUCTION COMPEL THE CONCLUSION THAT CONGRESS DID NOT INTEND TO AUTHORIZE CITIZEN SUITS FOR PAST EPCRA VIOLATIONS .....	30
III. CBE LACKS ARTICLE III STANDING TO SUE FOR PAST EPCRA VIOLATIONS .....	34
A. CBE Cannot Establish an Injury-in-Fact Because The Steel Company Was in Compliance with EPCRA When CBE Filed Its Complaint .....	36
B. Payment of Penalties to the U.S. Treasury or an Award of CBE's Fees Does Not Satisfy Article III's Redressability Requirement .....	37
IV. COMPLYING WITH EPCRA TAKES MUCH MORE THAN A "MINIMAL EFFORT" .....	42
V. NOTHING INDICATES THAT CONGRESS INTENDED CITIZENS TO HAVE UNBRIDLED DISCRETION TO DETERMINE WHEN TO BRING ACTIONS FOR CURED PAST VIOLATIONS .....	45
CONCLUSION .....	50

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Adair v. Troy State Univ.</i> , 892 F. Supp. 1401 (M.D. Ala. 1995) .....	20
<i>Atlantic States Legal Found., Inc. v. Buffalo Envelope Co.</i> , 823 F. Supp. 1065 (W.D.N.Y. 1993) .....	40
<i>Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.</i> , 61 F.3d 473 (6th Cir. 1995) ...	passim
<i>Bennett v. Spear</i> , 65 U.S.L.W. 4201 (March 19, 1997) ....	35
<i>Coalition for Health Concern v. LWD, Inc.</i> , 60 F.3d 1188 (6th Cir. 1995) .....	26
<i>Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.</i> , 989 F.2d 1305 (2d Cir. 1993) .....	26
<i>Dague v. City of Burlington</i> , 935 F.2d 1343 (2d Cir. 1991), <i>rev'd in part on other grounds</i> , 505 U.S. 557 (1992) .....	19
<i>Defenders of Wildlife v. Hodel</i> , 851 F.2d 1035 (8th Cir. 1988), <i>rev'd sub nom. Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	41
<i>Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.</i> , 813 F. Supp. 1132 (E.D. Pa. 1993) .....	41
<i>Diamond v. Charles</i> , 476 U.S. 54 (1986) .....	38
<i>Don't Waste Arizona v. McLane Foods, Inc.</i> , 950 F. Supp. 972 (D. Ariz. 1996) .....	40
<i>Gwaltney v. Chesapeake Bay Found., Inc.</i> , 484 U.S. 49 (1987) .....	passim
<i>Hallstrom v. Tillamook County</i> , 844 F.2d 598 (9th Cir. 1987), <i>aff'd</i> , 493 U.S. 20 (1989) .....	18

## TABLE OF AUTHORITIES - Continued

Page

<i>Hallstrom v. Tillamook County</i> , 493 U.S. 20 (1989) .....	12, 14, 15, 17, 19, 25
<i>Handy Bros. Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 848 F. Supp. 1276 (S.D. Miss. 1994) .....	30
<i>Healy v. Ratta</i> , 292 U.S. 263 (1934) .....	30
<i>Lessee of Brewer v. Blougher</i> , 39 U.S. (14 Peters) 178 (1840) .....	30
<i>Lewis Continental Bank v. Lewis</i> , 494 U.S. 472 (1990) ....	38
<i>Los Angeles v. Lyons</i> , 461 U.S. 95 (1983) .....	36
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	11, 34, 35, 38, 41
<i>Maine v. Taylor</i> , 477 U.S. 131 (1986) .....	37
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) .....	35
<i>Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n</i> , 453 U.S. 1 (1981) .....	33, 36
<i>Moreco Energy, Inc. v. Penberthy-Houdaille</i> , 682 F. Supp. 931 (N.D. Ill. 1988) .....	26
<i>National Oilseed Processors Ass'n v. Browner</i> , 924 F. Supp. 1193 (D.C.C. 1996) .....	28
<i>Satterfield v. J.M. Huber Corp.</i> , 888 F. Supp. 1561 (N.D. Ga. 1994) .....	17
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972) .....	29
<i>Simon v. Eastern Ky. Welfare Rights Org.</i> , 426 U.S. 26 (1976) .....	35
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1974) .....	36
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984) .....	37

## TABLE OF AUTHORITIES - Continued

Page

<i>United States v. Murphy</i> , 934 F.2d 899 (7th Cir. 1991) .....	44
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982) .....	34, 35
<i>Victory Carriers, Inc. v. Law</i> , 404 U.S. 202 (1971) ....	30
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975) .....	35, 40

## CONSTITUTIONAL PROVISIONS

U.S. Constitution, Art. III, § 2, Cl. 1 .....	<i>passim</i>
---	---------------

## STATUTES

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y .....	14
Toxic Substances Control Act, 15 U.S.C. § 2619(a) .....	26, 29
Endangered Species Act, 16 U.S.C. § 1540(g) .....	29
18 U.S.C. § 1001 .....	44
28 U.S.C. § 1254(1) .....	1
Clean Water Act, 33 U.S.C. § 1365 .....	15, 19, 22, 31
Resource Conservation and Recovery Act, 42 U.S.C. § 6972 .....	15, 19, 26, 29
Clean Air Act, 42 U.S.C. § 7604 .....	16, 17, 20, 29, 41

## TABLE OF AUTHORITIES - Continued

Page

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659.....	26, 29
Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11004(a) .....	34
42 U.S.C. § 11022.....	1, 2, 6
42 U.S.C. § 11023.....	2, 6, 7, 32
42 U.S.C. § 11045(c) .....	7
42 U.S.C. § 11046.....	<i>passim</i>
Pollution Prevention Act of 1990, 42 U.S.C. § 13101(b) .....	7
42 U.S.C. § 13106(a) .....	7, 18
Pub. L. No. 101-549, 104 Stat. 2399, 2682 (codified at 42 U.S.C. § 7604(a)).....	16, 41
Federal Rule of Civil Procedure 12(b)(1).....	9
Federal Rule of Civil Procedure 12(b)(6).....	9

## REGULATIONS

40 C.F.R. § 370.40-41.....	43
40 C.F.R. § 372.85.....	6

## LEGISLATIVE HISTORY

Conf. Rep. No. 1236, 92d Cong., 2d Sess (1972), reprinted in 1972 U.S.C.C.A.N. 3776 .....	29
--	----

## TABLE OF AUTHORITIES - Continued

Page

H.R. Rep. No. 1146, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 5356 .....	20
S. Rep. No. 414, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3668 .....	19
Statement by President George Bush Upon Sign- ing S. 1630 (Clean Air Act Amendments of 1990), reprinted in 1990 U.S.C.C.A.N. 3887-1 .....	41

## MISCELLANEOUS

61 Fed. Reg. 33588 (June 27, 1996) .....	42
61 Fed. Reg. 38600 (July 25, 1996).....	6
61 Fed. Reg. 67017 (Dec. 19, 1996) .....	6
Black's Law Dictionary 534 (5th Ed. 1979).....	33
Barry Boyer & Errol Meidinger, <i>Privatizing Regula- tory Enforcement</i> , 34 Buff. L. Rev. 833 (1985).....	14
Brief of the United States as Amicus Curiae Sup- porting Affirmance, <i>Gwaltney</i> , 484 U.S. 49 (1987) ....	39
<i>Confusion About EPCRA Rule Acknowledged</i> , Chem. Reg. Rep. (BNA), Aug. 17, 1990 .....	43
EPA EPCRA Section 312 Penalty Policy (June 13, 1990).....	9, 24, 44
EPA EPCRA Section 313 Penalty Policy (Aug. 10, 1992).....	9, 24, 44
EPA Eyes Changes to EPCRA Regulations to Clarify "Gray Areas," Increase Compliance, Toxics Law Rep. (BNA), March 9, 1994 .....	43

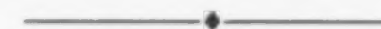
## TABLE OF AUTHORITIES - Continued

Page

General Accounting Office, <i>EPA's Toxic Release Inventory Is Useful But Can Be Improved</i> , (June 1991) GAO/RCED 91-121 .....	7
Michael S. Greve, <i>The Private Enforcement of Environmental Law</i> , 65 Tulane L. Rev. 339 (1990) .....	45
<i>Nonprofits Cashing In on Lawsuits</i> , The Business Journal-Phoenix, June 21, 1996 .....	48
Title III List of Lists: <i>Consolidated List of Chemicals Subject to EPCRA</i> , EPA, June 1994 .....	43
Michael J. Walker & Jon D. Jacobs, <i>EPCRA Citizens Suits: An Evolving Opus with a Discordant Note</i> , The Journal of Environmental Law & Practice, Jan./Feb. 1997 .....	46

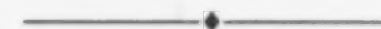
## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. App. A1-A15) is reported at 90 F.3d 1237. The opinion of the United States District Court for the Northern District of Illinois (Pet. App. A17-A26) is reported at 42 Env't Rep. Cases (BNA) 1186.



## JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on July 23, 1996. Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1) in a Petition filed on October 21, 1996. This Court granted the Petition on February 24, 1997.



## STATUTORY PROVISIONS INVOLVED

Section 326 of EPCRA, 42 U.S.C. § 11046, provides in pertinent part:

(a)(1) Except as provided in subsection (e) of this section, any person may commence a civil action on his own behalf against the following:

(A) An owner or operator of a facility for failure to do any of the following:

\* \* \*

(iii) Complete and submit an inventory form under section 11022(a) of this title containing tier I information as described in section 11022(d)(1) of this title unless such requirement does not apply by reason

of the second sentence of section 11022(a)(2) of this title.

(iv) Complete and submit a toxic chemical release form under section 11023(a) of this title.

\* \* \*

(b)(1) Any action under subsection (a) of this section against an owner or operator of a facility shall be brought in the district court for the district in which the alleged violation occurred.

\* \* \*

(c) The district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement.

\* \* \*

(d)(1) No action may be commenced under subsection (a)(1)(A) of this section prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs, and the alleged violator.

\* \* \*

(e) No action may be commenced under subsection (a) of this section against an owner or operator of a facility if the Administrator has commenced and is diligently pursuing an administrative order or civil action to enforce the requirement concerned or to impose a civil penalty under this chapter with respect to the violation of the requirement.

—◆—

## STATEMENT OF THE CASE

Petitioner The Steel Company is a small, minority-owned steel pickler and reduction mill located on the industrial southeast side of Chicago. It has about 55 employees and has been in business since 1971. The Steel Company is regulated by several air, water, hazardous waste, and other environmental requirements. Upon beginning its operations and regularly since then, The Steel Company has been inspected by federal, state and local regulatory agencies. It has willingly complied with these numerous and appropriate requirements, and yet, despite all of this regulatory activity, it remained uninformed that in addition it must file forms under EPCRA. Upon notice, it quickly responded, filing past and current forms, and since then has remained in timely compliance.

Moreover, much of the information required by EPCRA is reported to government agencies in other forms. For example, in 1991, The Steel Company submitted a Chemical Safety Contingency Plan to the Chicago Fire Department, Chicago Police Department and two local hospitals detailing the chemicals present at the facility and their chemical properties and locations.<sup>1</sup>

The Steel Company's main process is steel pickling, which is a finishing operation that removes scale and rust

---

<sup>1</sup> A copy of relevant excerpts of the Contingency Plan has been lodged with the Court.

from steel coils to ensure uniform shape and provide a surface that is easily coated or further processed. "Scale" is a black or gray coating of oxide which forms on steel as it cools. Rust is a reddish brittle coating formed on steel as it is attacked by moist air over time.

Steel coils are first unwound and then pulled through a series of sealed tanks containing diluted hydrochloric acid or "pickle liquor." The acid bath removes the scale and rust, which dissolve in the pickling tanks. The spent pickle liquor is shipped off-site, according to applicable regulations, by licensed transporters to licensed facilities and then recycled in other processes. For example, municipalities use The Steel Company's spent liquor in their wastewater plants to treat sewage. Industry also recycles the spent liquor as a raw material to make iron oxide, which is used as a coating for audio, video and computer tapes.

After passing through the pickling tanks, the steel is washed with high-pressure rinse water sprays to remove any remaining acid and is then air-dried. Most of the rinse water is recycled back into the pickling tanks. Excess rinse water is collected in a holding tank and treated on-site to adjust the pH factor and to remove dissolved and undissolved solids in accordance with applicable regulations. Only the neutralized and cleaned water is discharged to the local Chicago water treatment works. Over 95 percent of The Steel Company's waste hydrochloric acid and waste rinse water is either recycled off-site or treated on-site. See The Steel Company's 1992-95 Form Rs at p. 9, attached to its Reply Memorandum in Support of Motion to Dismiss at Exh. B.

### A. The Purpose and Structure of EPCRA

In 1986, in response to several chemical releases, including the tragedy in Bhopal, India and other smaller incidents in the United States, Congress enacted EPCRA, which includes certain reporting requirements for industrial facilities. Pet. App. A2. Congress was reacting to a perceived lack of reliable and accessible information regarding the location and use of chemicals, and passed EPCRA to fill "this informational void and improv[e] emergency response capabilities." *Id.* The main purposes of EPCRA are thus twofold: 1) to compile information on the presence and release of chemical substances and make that information available to the public; and 2) to use the reported information to help formulate emergency response plans to react to accidental releases of chemicals. *Id.* A2-A4. Although Congress realized that much of industry's chemical data was already available to the public, it also knew that the information was listed on several different forms and located in different places. Congress thus recognized a need to have the information readily available to the public in a comprehensible form.<sup>2</sup> *Id.* A3.

While it is difficult to measure EPCRA's effect on industry behavior (EPCRA requires no emission controls or reductions), some claim that EPCRA's "public release

---

<sup>2</sup> While the Seventh Circuit rightly noted that "most of the required information must be compiled and reported for other purposes," it was severely mistaken that "the cost of compliance with EPCRA's reporting requirements is low." Pet. App. A4. See, e.g., Amicus Brief of Chemical Manufacturers Association in Support of Petitioner regarding costs and burdens of EPCRA reporting.

of information about discharge of toxic chemicals has by itself spurred competition to reduce releases, quite independently of government regulation." *Id.* A2 (citation omitted). Notwithstanding the public's increased awareness of chemical use, other factors also play a role in influencing industry. The United States Environmental Protection Agency (EPA) acknowledges that financial incentives, in addition to EPCRA's reporting obligations, motivate industry to reduce its emissions. 61 Fed. Reg. 38600, 38602 (July 25, 1996). Whatever its role, EPCRA has contributed to the significant improvement in the nation's environmental quality over the past decade.

Of the six EPCRA reporting requirements applicable to industry, two are at issue here. Section 312 requires certain facilities to submit inventory forms, which provide information regarding the amount and location of "hazardous chemicals" at a facility, to state and local agencies. 42 U.S.C. § 11022(a), 11022(d). The inventory forms for a given calendar year are due by March 1 of the following year. 42 U.S.C. § 11022(a). Approximately 870,000 facilities are required to report under Section 312. 61 Fed. Reg. 67017, 67018 (Dec. 19, 1996).

Section 313 requires certain manufacturing facilities using any of approximately 650 specified "toxic chemicals" to submit forms which provide information about the amount of those chemicals at a facility and their release, if any, into the environment, including allowable releases authorized by agency permits or licensed disposal facilities. Section 313 forms are submitted to the EPA and a designated state official. 42 U.S.C. §§ 11023(a), 11023(g). EPA has created the "Form R" as its uniform chemical release form, 40 C.F.R. § 372.85, which for a given calendar year is due by July 1 of the following year.

42 U.S.C. § 11023(a). Approximately 30,000 facilities are required to file Form Rs. *EPA's Toxic Release Inventory Is Useful but Can Be Improved*, at 49 (June 1991) GAO/RCED 91-121.

In expanding EPCRA's reporting requirements in 1990, Congress declared that "the national policy of the United States [is] that pollution should be prevented or reduced at the source whenever feasible." 42 U.S.C. § 13101(b). As part of the strategy to promote source reduction, Congress required facilities subject to Section 313 to include "a toxic chemical source reduction and recycling report" in their annual filings. *Id.* at § 13106(a).

Violators of Sections 312 and 313 may be liable to the United States for civil penalties up to \$25,000 for each day of each violation. 42 U.S.C. § 11045(c)(1 & 3). EPA may seek penalties either in an administrative action or in federal court. *Id.* at § 11045(c)(4).

EPCRA authorizes citizens to sue regarding four of the six reporting requirements. In pertinent part, EPCRA provides that "any person may commence a civil action on his own behalf against . . . an owner or operator of a facility for failure to . . . [c]omplete and submit an inventory form under section [312] [or] a toxic chemical release form under section [313]. . . ." *Id.* at § 11046(a)(1)(A)(iii & iv). A would-be citizen plaintiff is first required to provide notice of the alleged violation to EPA, the state, and the alleged violator, and must wait at least 60 days before filing suit. *Id.* at § 11046(d)(1). If EPA elects to pursue the violator administratively or in court, however, the citizen is barred from duplicating that effort and may not file suit. *Id.* at § 11046(e). Although EPCRA's legislative history is silent on the purpose of the notice period, in

examining the citizen suit notice provision of the Clean Water Act (CWA), this Court found that one purpose of the notice was to allow the violator an opportunity to come into compliance, thus rendering a citizen suit unnecessary. *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987).

In presiding over a citizen suit, a district court has jurisdiction "to enforce the requirement concerned and to impose any civil penalty provided for a violation of that requirement." 42 U.S.C. § 11046(c). A court may award costs of litigation, including attorneys' fees, "to the prevailing or substantially prevailing party whenever the court determines such an award is appropriate." *Id.* at § 11046(f).

#### B. Proceedings Below

On March 16, 1995, Citizens for a Better Environment (CBE) sent to the EPA, Illinois Environmental Protection Agency (IEPA), and The Steel Company an EPCRA 60-day notice of intent to sue alleging that The Steel Company had not submitted certain forms as required by Sections 312 and 313. Up to that point, The Steel Company was uninformed about EPCRA.<sup>3</sup> Upon receiving the notice, The Steel Company tasked its environmental consultant and attorneys to investigate EPCRA's requirements, and on May 1, 1995, before the 60-day notice period had expired, it submitted Sections 312 and 313 forms for all reporting years to the EPA, IEPA, the Illinois

<sup>3</sup> The Seventh Circuit noted that, "Many industrial facilities subject to the Act remained unaware of its existence long after it went into effect." Pet. App. A2 (citation omitted).

Emergency Management Agency, and the Chicago Fire Department. J.A. 17-18; Pet. App. A19, A25.

Notwithstanding The Steel Company's compliance within the 60-day period, on August 7, 1995, CBE filed suit. CBE alleged only past EPCRA violations, and, significantly, did not seek injunctive relief ordering The Steel Company to comply with EPCRA, as compliance had already been achieved. J.A. 11; Pet. App. A19, A25. While The Steel Company's omissions amounted to a failure to submit the inventory form once each year for eight years for three chemicals and the Form R once each year for seven years for one chemical, CBE calculated these omissions as multiple and daily, amounting to 21,500 violations. At \$25,000 per day for each violation, CBE requested penalties of over \$537 million.<sup>4</sup> J.A. 8-11.

The Steel Company filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) arguing that there was no Article III case or controversy and also that Sixth Circuit and Supreme Court precedent barred the action. J.A. 18. Relying on the Sixth Circuit's opinion in *Atlantic States Legal Found., Inc. v. United Musical Instruments, Inc.*, 61 F.3d 473 (6th Cir. 1995), the district court granted The Steel Company's motion:

<sup>4</sup> In contrast, EPA's Penalty Policies treat first-time violations as "one-day" violations. EPA assesses "per day" penalties only in cases of egregious violators, such as those who were previously the subject of an EPA enforcement action. EPA Section 312 Penalty Policy (June 13, 1990) at 8, 20-21. EPA Section 313 Penalty Policy (Aug. 10, 1992) at 11, 13-14.

This Court concludes that § 326(a) of EPCRA does not provide the right for a citizen to sue for historical violations of the Act. The "complete and submit" language of that section, along with the purpose of the notice provision and Congress' intended role for the citizen-plaintiff, leads the Court to that decision. . . . In addition, it is uncontested that before the Complaint was filed, Steel Company filed the proper forms with the required agencies for the relevant periods in response [to] CBE's notice of intent to sue. If it were not the case it seems likely that CBE would have included such an allegation in their complaint; no such allegation is present. Because the Complaint alleges only a failure to timely file the required reports, a violation of the Act for which there is no jurisdiction for a citizen suit, the Court dismisses the Complaint.

Pet. App. A24-A26 (footnotes omitted).

The district court noted the Sixth Circuit found support for its decision in *Gwaltney* where this Court held that one purpose of the 60-day non-adversarial notice period is to allow the alleged violator an opportunity to come into compliance. Pet. App. A23-A24. This Court also found that allowing citizen suits for past violations would undermine EPA's enforcement discretion. *Gwaltney*, 484 U.S. at 60-61.

CBE appealed the judgment of the district court to the Seventh Circuit Court of Appeals, and on July 23, 1996, the Seventh Circuit reversed. The Seventh Circuit chose not to follow *United Musical* or *Gwaltney*. With respect to *United Musical*, the Seventh Circuit squarely disagreed. With respect to *Gwaltney*, the Seventh Circuit chose to focus on a difference in statutory wording to

conclude that Congress must have intended EPCRA citizen plaintiffs to sue for past violations: while the CWA authorizes citizens to sue a facility "alleged to be in violation" of its permit or other requirement, EPCRA authorizes citizens to sue "for failure to" comply with certain reporting requirements. Pet. App. A11.

The court also did not follow this Court's reasoning that one purpose of the 60-day notice period is to allow an alleged violator an opportunity to come into compliance, nor did it elect to examine Congress's reasons for establishing the notice period. *Id.* A13. The court apparently dismissed this Court's reasoning in *Gwaltney* on the sole ground that because Congress amended the Clean Air Act (CAA) in 1990 to permit citizen suits for some past violations, yet left the notice provision intact, Congress must have intended to remove the opportunity to come into compliance from all environmental statutes. *Id.* The Seventh Circuit also failed to recognize that citizens do not have Article III standing to sue for past violations, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Gwaltney*, 484 U.S. at 70 (Scalia, J., concurring), and that Congress modeled EPCRA's citizen suit provision after long-standing principles found in all environmental citizen suit provisions, and thus could not have intended to have EPCRA's provision operate differently from those of other, previously enacted, statutes.

---

#### SUMMARY OF ARGUMENT

This Court has previously found that one purpose of the 60-day environmental citizen notice period is to allow

an alleged violator an opportunity to come into compliance, thus rendering a citizen suit unnecessary. *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Gwaltney*, 484 U.S. 49. EPCRA's notice provision is identical to those already examined by this Court, and should be accorded the same purpose. Interpreting the citizen suit provision as allowing an opportunity to cure promotes the purposes Congress intended it to serve and is fully supported by the legislative history of previously enacted statutes upon which EPCRA is modeled.

Congress intended citizen suits to be a limited supplement to government actions to secure compliance. EPCRA thus presupposes the existence of an ongoing violation before a citizen suit may be filed. Allowing citizens to seek penalties for past violations would also undermine EPA's enforcement discretion, a result this Court did not find warranted under the CWA.

Although EPCRA contains slightly different language from the CWA and other citizen suit provisions, Congress gave no indication that EPCRA should be treated any differently. In the absence of a contrary congressional intent, Congress should not be presumed to have made a substantial change from its customary citizen suit model. A statute conferring jurisdiction on the federal courts should also be strictly construed, and any doubts resolved against jurisdiction. Here there are serious doubts that Congress intended citizens to sue for past EPCRA violations, and all citizen plaintiffs can highlight is a slight difference in language and attempt to stretch that difference into federal jurisdiction.

To invoke the jurisdiction of the federal courts, a plaintiff also must satisfy the standing requirements of Article III of the Constitution. The constitutional limits on the exercise of federal jurisdiction are founded in concern about the properly limited role courts should play in a democratic society. This Court has therefore interpreted Article III's "case" or "controversy" clause to require a plaintiff to have a personal stake, and not a "generalized interest," in the outcome of a case.

Allowing a citizens group, like CBE, to seek penalties for wholly past EPCRA violations is an attack on this basic constitutional principle. The notion that CBE, at the time it filed its complaint, had an injury that could be redressed by its requested relief would open the federal courts to lawsuits this Court has found unwarranted. As it may not modify or abrogate the "irreducible constitutional minimum" of standing, Congress could not have intended to authorize citizen groups to sue for past EPCRA violations.

Ignoring congressional intent and permitting citizen suits for past EPCRA violations would expand the limited, supplemental role of citizen suits and flood the federal courts with an excessive number of citizen suits, a result Congress clearly sought to avoid. If citizen suits may be brought for purely past violations, all that a citizen plaintiff need do is examine EPCRA filings that were submitted after the annual filing dates and file suit seeking penalties of \$25,000 per day. Because EPCRA is a strict liability statute, any EPCRA reporting violation, even if cured, would support federal jurisdiction, and the citizen group would stand to recover its attorneys' fees in what was a lawsuit without any environmental purpose.

The goal of environmental compliance was achieved when The Steel Company, upon receiving CBE's notice, promptly filed its EPCRA forms. This is exactly what Congress intended in fashioning EPCRA's citizen suit provision. EPCRA's citizen enforcement scheme, like those of other environmental statutes, allows citizens to enforce only against those companies that are unable or unwilling to comply before suit is filed.

---

### ARGUMENT

#### I. THIS COURT'S INTERPRETATION OF THE CITIZEN SUIT NOTICE PROVISION, EPCRA'S LANGUAGE, AND LEGISLATIVE HISTORY SHOW THAT CONGRESS DID NOT INTEND TO AUTHORIZE CITIZENS TO SUE FOR PAST VIOLATIONS

##### A. This Court Has Held That Congress Provided a Notice Period in Environmental Citizen Suits to Prompt Either Voluntary Compliance or Government Enforcement

Using the model it created in the CAA Amendments of 1970, Congress has included a citizen suit provision in every piece of federal environmental legislation except one.<sup>5</sup> Consequently, the citizen suit provisions in federal environmental laws resemble each other almost completely. See *Hallstrom*, 493 U.S. at 22-23 & n. 1; Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 847-51 (1985).

---

<sup>5</sup> The Federal Insecticide, Fungicide, and Rodenticide Act does not have a citizen suit provision. 7 U.S.C. §§ 136-136y.

Congress requires a would-be citizen suit plaintiff to provide "notice of the alleged violation" to EPA, the state in which the alleged violation "occurs," and the alleged violator at least 60 days before filing suit. See, e.g., 33 U.S.C. § 1365(b)(1)(A) (CWA), 42 U.S.C. § 6972(b)(1)(A) (Resource Conservation and Recovery Act (RCRA)). Congress included an identical notice provision in EPCRA, which likewise requires a citizen to provide "notice of the alleged violation" to EPA, the state in which the alleged violation "occurs," and the alleged violator at least 60 days before filing suit. 42 U.S.C. § 11046(d)(1).

In addition to requiring the would-be plaintiff to wait until the notice period expires, Congress bars a citizen suit if the government has already brought an action to secure compliance. See, e.g., 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 6972(b)(1)(B). Congress likewise included this restriction in EPCRA, prohibiting a citizen suit if the government has brought an action to enforce the requirement concerned. 42 U.S.C. § 11046(e).

The purpose of the citizen suit notice period is twofold: 1) it gives the alleged violator the opportunity to bring itself into compliance, thus rendering a citizen suit unnecessary; and 2) it also gives the government the opportunity to determine whether it should utilize its own considerable powers to enforce compliance, thus barring a citizen suit. *Hallstrom*, 493 U.S. at 29-31 (interpreting RCRA's notice provision); *Gwaltney*, 484 U.S. at 60-61 (1987) (CWA); *United Musical*, 61 F.3d at 475-78 (EPCRA). In *Gwaltney*, this Court examined for the first time the purposes of the notice provision. Justice Marshall, writing for a unanimous Court, explained:

If [EPA] or the State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit. If we assume, as respondents urge, that citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes wholly gratuitous.

*Gwaltney*, 484 U.S. at 60.

The Court bolstered its conclusion by examining the legislative history behind environmental citizen suits. Members of Congress characterized the citizen suit provisions as "abatement" or "injunctive" measures, compelling the Court to conclude that Congress intended a citizen suit to proceed only if there is a continuing violation, and thus a violation to enjoin. *Id.* at 61-62. The Court also noted that the CWA's citizen suit provision was modeled after the CAA's provision which (at the time) was "wholly injunctive in nature." *Id.* at 62.<sup>6</sup>

In reiterating its *Gwaltney* reasoning two years later in a RCRA citizen suit, this Court again sought guidance from congressional intent and found that "the [CAA's]

---

<sup>6</sup> In 1972, in passing the CWA's citizen suit provision, Congress added the penalty remedy, providing an extra incentive to industry to comply. Also, in 1990, Congress amended the CAA to add the penalty remedy. Pub. L. No. 101-549, 104 Stat. 2399, 2682 (codified at 42 U.S.C. § 7604(a)). Congress knows how to provide citizens with the enforcement tools it deems warranted.

legislative history indicates an intent to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom*, 493 U.S. at 29. As it had in *Gwaltney*, this Court acknowledged that Congress intended the notice period to stimulate an enforcement action by the government or compliance by the alleged violator, "thus obviating the need for citizen suits." *Id.*

The Seventh Circuit dismissed *Gwaltney* solely because three years after *Gwaltney* was decided, Congress amended the CAA "to permit citizen enforcement actions for past violations, yet left the notice provision intact." Pet. App. A13. This led the Seventh Circuit somehow to conclude that *Gwaltney's* reasoning that the notice provision operates as an opportunity to cure "is no longer as compelling as it was when *Gwaltney* was decided." *Id.* But the Seventh Circuit failed to recognize that Congress addressed its *Gwaltney* concerns with limitation. Under the amended CAA, a citizen may sue for past violations only "if there is evidence that the alleged violation has been repeated." 42 U.S.C. § 7604(a)(1).<sup>7</sup> Somehow the Seventh Circuit discerned in this amendment a wholesale

---

<sup>7</sup> Under this Court's Article III jurisprudence, as further explained below, this provision is unconstitutional if it does not require a continuing violation. In interpreting the amended CAA, one court has held that "courts will not allow citizens to file suits based on violations that have been corrected. The Clean Air Act citizen suit provision is not intended to be a windfall for plaintiffs. Rather it is intended to encourage and enforce compliance with environmental regulations." *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1561, 1565 (N.D. Ga. 1994).

repudiation of *Gwaltney*, finding that the notice period no longer functions as an opportunity to cure, and applied that flawed reasoning to EPCRA, a statute Congress did not amend. Pet. App. A13.

The Sixth Circuit recognized this and reasoned that "by amending the Clean Air Act, but failing to amend EPCRA, Congress intended to limit EPCRA's citizen suit provision to violations existing at the time the suit is filed." *United Musical*, 61 F.3d at 477. By discussing *Gwaltney*, but by amending only in part the CAA, Congress noted its approval of one purpose of the notice provision: to allow the alleged violator to come into compliance.<sup>8</sup>

By providing notice, citizen groups such as CBE operate as facilitators of congressional intent that EPCRA reporting requirements be met. Filing a lawsuit, with its attendant costs for the parties and burdens on the judicial system, should be a last resort if quick corrective action does not follow or if government enforcement lags. The Steel Company's compliance makes CBE's action complete and allows CBE to move on with its goal of prompting (and where necessary enforcing) environmental compliance. See also *Hallstrom v. Tillamook County*, 844 F.2d 598, 600-01 (9th Cir. 1987) ("Litigation should be a

---

<sup>8</sup> As noted above, Congress did amend EPCRA in 1990 (three years after *Gwaltney*) to expand its reporting requirements, 42 U.S.C. § 13106(a), but did not amend EPCRA's citizen suit provision. Had Congress wanted to specify that *Gwaltney's* holding did not govern EPCRA, it could have easily done so in 1990.

last resort only after other efforts have failed."), *aff'd*, 493 U.S. 20.

As further evidence that it knew what it was doing when it established citizen suits, this Court noted that Congress has eliminated the 60-day waiting period so that citizens may file suit immediately after providing notice in certain cases involving potential serious harm to health and the environment. *Hallstrom*, 493 U.S. at 30 (citing CAA and CWA, this Court noted that "Congress has addressed the dangers of delay in certain circumstances and made exceptions to the required notice periods accordingly.") For example, a citizen is authorized to sue immediately for violations of RCRA's hazardous waste regulations. 42 U.S.C. § 6972(b). Congress carved out this exception to the 60-day notice period because it "determined that with hazardous wastes the dangers of delay and the potential for greater damage to public health or the environment outweigh the justifications of the pre-suit delay periods." *Dague v. City of Burlington*, 935 F.2d 1343, 1351 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992).

A citizen also may sue immediately for violations of the CWA's national standards of performance. 33 U.S.C. § 1365(b). Congress believed that these standards, which are "designed to assure that new stationary sources of water pollution are designed, built, equipped, and operated to minimize the discharge of pollutants, [are] among the most significant in the legislation." S. Rep. No. 414, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3723-24. Congress emphasized that "enforcement of these [standards] be immediate, that citizens should be unconstrained to bring these actions, and that the courts

should not hesitate to consider them." *Id.*, reprinted in 1972 U.S.C.C.A.N. at 3746. Congress also did away with the 60-day waiting period in actions addressing violations of the CAA's hazardous air pollutant requirements. 42 U.S.C. § 7604(b). Congress created this exception because it believed that emissions of hazardous air pollutants are "extremely hazardous to health" justifying immediate citizen action. See H.R. Rep. No. 1146, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5365; *Adair v. Troy State Univ.*, 892 F. Supp. 1401, 1406-09 (M.D. Ala. 1995) (examining history of exception).

There may be other instances where one could argue that Congress should have provided immediate citizen access to the courts. In passing EPCRA, however, Congress did not choose this readily available option, and thus indicated that EPCRA's notice provision should not be treated differently from those of other environmental statutes. While Congress believed that the gathering and submission of information to the government and the public is important, Congress did not judge EPCRA's reporting requirements to be among those warranting citizen enforcement prior to an opportunity to remedy, and thus mandated a 60-day notice period with no exceptions.

**B. The Seventh Circuit Elevated Citizen Plaintiffs to an Enforcement Level Equal to That of EPA, a Result Congress Clearly Did Not Intend**

The Seventh Circuit failed to appreciate the crucial distinction between government and citizen enforcement

of EPCRA: Congress simply did not intend to provide citizens with the same enforcement authority it gave to the government. This Court recognized that allowing citizens to sue for past violations "would create a second and more disturbing anomaly. The bar on citizen suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. at 60. This Court expressed understandable concern that citizen suits based on past violations could hamper the government's enforcement discretion:

If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

*Id.* at 61.

A comparison of the citizen suit provisions of the CWA and EPCRA compels the conclusion that Congress, as under the CWA, did not intend to authorize citizen suits for past EPCRA violations. If an EPCRA citizen suit is filed, the federal courts have jurisdiction:

to enforce the requirement concerned *and* to impose any civil penalty provided for violation of that requirement.

42 U.S.C. § 11046(c) (emphasis added). The CWA's citizen suit provision likewise gives federal courts jurisdiction "to enforce such an effluent standard . . . and to apply any appropriate civil penalties. . . ." 33 U.S.C. § 1365(a)(2) (emphasis added). This Court in *Gwaltney* found this language compelling, and in holding that Congress did not intend to authorize citizen suits for past CWA violations, reasoned:

[CWA's citizen suit provision] does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referenced to in the same subsection, even in the same sentence. The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement. A comparison of [the relevant CWA sections] thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit to enjoin or otherwise abate *an ongoing violation*.

*Gwaltney*, 484 U.S. at 58-59 (emphasis added).

As in the CWA, EPCRA's citizen suit provision does not authorize civil penalties separately from injunctive relief. In fashioning EPCRA's citizen suit provision, Congress intended to authorize a citizen to seek civil penalties only in a suit brought to enjoin an ongoing violation. Because there was no dispute that The Steel Company was in compliance with EPCRA before the 60-day notice period expired, the lower court correctly dismissed CBE's suit.

The Sixth Circuit was likewise influenced by the differences between citizen and EPA enforcement:

This difference between the grants of authority to the EPA and citizen plaintiffs is significant because it indicates a congressional intent to limit citizen suits to ongoing violations and to give EPA sole authority to seek penalties for historical violations. . . . Although civil penalties for purely historical violations may be appropriate in some cases, the congressional scheme leaves to the EPA, with its broad perspective on the entire spectrum of enforcement and compliance, discretion to determine those violators whose conduct warrants such penalties.

*United Musical*, 61 F.3d at 475, 477.<sup>9</sup> Upon receiving CBE's notice letter, EPA learned that The Steel Company was a potential EPCRA violator, yet it elected not to pursue penalties. Nothing in EPCRA indicates that Congress intended private citizens like CBE to usurp EPA's discretion and pursue penalties on its behalf if the alleged violator has come into compliance. CBE has nothing to pursue, the "congressional goal has been achieved, and an enforcement suit is unnecessary." *Id.* at 477.

In *Gwaltney*, this Court also posed the hypothetical in which EPA issued a compliance order and agreed not to assess penalties "on the condition that the violator take some extreme corrective action" by installing expensive pollution control equipment. *Gwaltney*, 484 U.S. at 60-61.

---

<sup>9</sup> EPA's "broad perspective" is important because EPA is equipped to fully appreciate whether a company otherwise compliant with environmental laws should be subject to the steep penalties that EPCRA provides. EPA does not seek penalties for every EPCRA violation.

The Court found that if a citizen could file suit months or years later to seek the penalties that EPA chose to forgo, EPA's enforcement discretion would be "curtailed considerably." *Id.* at 61. This likewise could occur under EPCRA. EPA recognizes that a party may install equipment or perform an environmentally beneficial project and pay either a reduced or no penalty. Section 312 Penalty Policy at 30 ("[T]he Agency has used its enforcement discretion to mitigate proposed penalties for some environmentally beneficial projects proposed and implemented by the respondent. In applying this penalty policy, this mitigation is completely discretionary."); Section 313 Penalty Policy at 19.

If the lower court is affirmed, however, citizens will be able to seek those penalties EPA chose to forgo. While EPCRA provides that a citizen suit is barred if EPA "has commenced and is diligently pursuing an administrative order or civil action," 42 U.S.C. § 11046(e), citizen groups, if authorized to sue for past violations, will be able to challenge any settlement arguing that the terms, especially EPA's penalty waiver, were too lenient and therefore not "diligently pursued."<sup>10</sup>

<sup>10</sup> The United States filed an *amicus* brief and also argued in support of CBE's appeal to the Seventh Circuit. The government erroneously concluded that "the hypothetical articulated in *Gwaltney* could not occur under EPCRA." If the lower court is affirmed, nothing in EPCRA will prohibit a citizen group from paging through thousands of settlements, however old, and challenging those the group feels are too lenient. The government failed to appreciate the ramifications of its position that certainly could lead to litigation over past EPCRA violations that the settling parties, including EPA, never could have imagined would later be subject to challenge.

### C. The Seventh Circuit Ignored the Similarities Between EPCRA and Other Environmental Citizen Suit Provisions

The Seventh Circuit erroneously concluded that EPCRA's citizen suit provision points to past violations. Pet. App. A11-A13. The court of appeals sought to distinguish *Gwaltney*, but its efforts to do so – particularly its side-by-side comparison of the language of EPCRA's and the CWA's citizen enforcement provisions – are unconvincing.

The court failed to acknowledge that Congress was not working off a blank slate when it drafted EPCRA's citizen suit provision. Using the model it created in 1970 under the CAA, Congress has inserted a citizen suit provision in almost 20 federal environmental statutes, including EPCRA. As noted above, like other environmental citizen suit provisions, *Hallstrom*, 493 U.S. at 22-23 & n.1, EPCRA requires a would-be citizen plaintiff to provide notice of the alleged violation. EPCRA likewise bars a citizen suit if the government elects to enforce. Further, EPCRA, like these other laws, provides for federal court jurisdiction without regard to the citizenship of parties or the amount in controversy, authorizes awards of attorneys' and expert witness fees, and allows intervention by the government and interested parties. EPCRA's provisions are thus nearly identical to that of other federal environmental citizen suit provisions.

Ignoring these similarities, the Seventh Circuit erred significantly in its interpretation of EPCRA's venue and

notice provisions. The court rightly noted that the use of the present tense in the CWA helped convince this Court that Congress did not intend to allow citizens to sue for past violations. Pet. App. A12-A13. However, the Seventh Circuit erroneously found that EPCRA must be different because "the enforcement provisions of EPCRA are not likewise cast in the present tense." *Id.* A13.

The Seventh Circuit first seized on EPCRA's venue provision, which provides that citizen suits "shall be brought in the district court for the district in which the violation occurred." *Id.* A13 (emphasis in original). But the Seventh Circuit ignored Congress's use of this exact language in the venue provisions of RCRA, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Toxic Substances Control Act (TSCA),<sup>11</sup> and yet courts have uniformly held, relying on *Gwaltney*, that these statutes do not allow citizen suits for past violations. See, e.g., *Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) (CERCLA citizen suit must allege continuing violation); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1315 (2nd Cir. 1993) (same for RCRA); *Moreco Energy, Inc. v. Penberthy-Houdaille*, 682 F. Supp. 931, 932 (N.D. Ill. 1988) (same for TSCA).<sup>12</sup> Moreover, the distinction relates only to venue, and not to the district court's jurisdiction.

<sup>11</sup> 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(b)(1); 15 U.S.C. § 2619(a).

<sup>12</sup> The CWA and CAA provide for suit in the district "in which such source is located," which is simply another way of phrasing "in which the violation occurred."

The Seventh Circuit next focused on the notice provision itself, which requires that the citizen send its notice to EPA, the alleged violator, and the state "in which the alleged violation occurs." Pet. App. A13 (emphasis in original). Again, the court ignored Congress's use of this exact language in every environmental citizen suit provision requiring notice to a state, including those that this Court found cannot support an action for past violations. Astonishingly, the court of appeals even went so far as to find that the word "occurs" is somehow not "cast in the present tense," *id.*, an obviously strained reading of the differences between the CWA and EPCRA, and an unfair parsing of language to reach a conclusion unsupported by this Court's previous holdings or the intent of Congress in establishing citizen suits.<sup>13</sup>

#### D. The Seventh Circuit Failed to Appreciate the Differences Between the Clean Water Act, Which Regulates Contamination, and EPCRA, Which Is Solely a Reporting Statute

In further explaining why it should not apply *Gwaltney*, the court below noted additional use of the present tense in the CWA. For example, the court noted that the CWA allows citizens to sue for violations "of a permit which is in effect" and also permits a state's

<sup>13</sup> In *Gwaltney*, this Court likewise focused on the tense of the word "occurs." The Court noted that several provisions of the CWA are cast in the present tense, including the notice provision: "Citizen-plaintiffs must give notice to the alleged violator, the Administrator of EPA, and the State in which the alleged violation 'occurs.'" *Gwaltney*, 484 U.S. at 59 (quotation marks in original).

governor to sue if a violation "is occurring in another State and is causing an adverse effect on the public or welfare in his State." Pet. App. A12 (emphasis in original). The Seventh Circuit's analysis stopped there, however, and it failed to realize that Congress could not have used such language in EPCRA because: 1) EPCRA does not require permits; and 2) since EPCRA requires solely the filing of information, an EPCRA violation could not involve the migrating contamination regulated under the CWA as might affect another state. "EPCRA does not restrict the manufacturing, processing, use or disposal of any chemical; it is simply a reporting statute. . . ." *National Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1197 (D.C.C. 1996). The Seventh Circuit thus failed to comprehend the differences between EPCRA and the CWA, or that *Gwaltney* prohibits a citizen suit for a cured violation, but not for one that is continuing.

In further support of its decision not to apply *Gwaltney*, the Seventh Circuit emphasized that this Court relied on the CWA's definition of "citizen" to conclude that "the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." Pet. App. A12-A13. The court noted that the CWA defines "citizen" as a "person . . . having an interest which is or may be adversely affected." *Id.* A12 (emphasis in original). Because EPCRA does not contain a definition of "citizen," the court appeared to suggest that, unlike with the CWA, Congress could not have intended EPCRA citizen suits to have only prospective application. *Id.* A12-A13.

It is not surprising that Congress defined citizen as it did in the CWA. By authorizing any "citizen" as so defined to bring an action, Congress intended to codify

the grant of standing articulated by the Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972), which was decided only six months before the CWA was amended. See Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3823. As further explained below, that EPCRA authorizes "any person" to bring a citizen suit cannot alter Article III's requirement that citizen suits be prospective in nature because inherent in every citizen suit provision are the constitutional requirements that a plaintiff suffer a redressable injury.<sup>14</sup> Consequently, the requirement that a person have standing, i.e., "an interest which is or may be adversely affected," necessarily underlies every citizen suit provision, including EPCRA's, even though EPCRA authorizes "any person" to sue. 42 U.S.C. § 11046(a).

The type of violation involved here – untimely reporting of information – also argues against authorizing citizen suits where a party has come into compliance. There is no basis to conclude that Congress intended to allow EPCRA citizen suits alleging past violations of a reporting requirement where other environmental statutes – those regulating discharges of pollutants into the environment – do not authorize citizen suits if the alleged violator has come into compliance. If any type of citizen suit for past violations is warranted, with the imposition of penalties and payment of a plaintiff's attorneys' fees, it

<sup>14</sup> Only in the CWA did Congress use the term "citizen." Like EPCRA, the other major environmental statutes – Endangered Species Act, CAA, RCRA, CERCLA and TSCA – authorize "any person" to bring a citizen action. 16 U.S.C. § 1540(g); 42 U.S.C. § 7604(a); 42 U.S.C. § 6972(a); 42 U.S.C. § 9659(a); 15 U.S.C. § 2619(a).

is for violations where direct harm to public health or the environment results, and not for reporting violations.

## II. PRINCIPLES OF STATUTORY CONSTRUCTION COMPEL THE CONCLUSION THAT CONGRESS DID NOT INTEND TO AUTHORIZE CITIZEN SUITS FOR PAST EPCRA VIOLATIONS

The Seventh Circuit did not find that EPCRA unambiguously authorizes citizens to sue for past violations. Rather, it resorted to principles of statutory construction. Pet. App. A10 ("We examine the statute before us in light of criteria the *Gwaltney* Court used to analyze the citizen suit provisions of the Clean Water Act.")

But the Seventh Circuit's alacrity in finding congressional authorization of citizen suits for past violations runs counter to basic principles of statutory construction. This Court has long held that statutes conferring jurisdiction on federal courts are to be strictly construed, and any doubts resolved against federal jurisdiction. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) (federal courts should "scrupulously confine their own jurisdiction to the precise limits which [a federal statute] has defined."); *Healy v. Ratta*, 292 U.S. 263, 270 (1934). Also, legislation creating liability where none existed at common law should be construed most favorably to the person or entity subject to liability. *Lessee of Brewer v. Blougher*, 39 U.S. (14 Peters) 178, 185, 10 L. Ed. 408, 411 (1840); *Handy Bros. Body Shop, Inc. v. State Farm Mut. Auto. Ins. Co.*, 848 F. Supp. 1276, 1287 (S.D. Miss. 1994).

Further, in comparing the CWA's "to be in violation" to EPCRA's "failure to do," the Seventh Circuit found

that, "The language of EPCRA contains no temporal limitation; 'failure to do' something can indicate a failure past or present." Pet. App. A11. Although EPCRA's legislative history provides no guidance on the issue, it is logical that Congress used the "failure to . . . complete and submit" language, without indicating any intent to allow citizen suits for past violations. While citizens may enforce hundreds, or even thousands, of different requirements of the CWA, CAA and RCRA, for example, EPCRA citizen plaintiffs are authorized to file suit regarding only four reporting requirements. 42 U.S.C. § 11046(a)(1)(A)(i-iv). Congress was therefore able to easily enumerate the four citizen-enforceable requirements using "failure to . . . complete and submit," and it did not have to use the catch-all "to be in violation" language used in other statutes to identify the numerous requirements subject to citizen enforcement. *See, e.g.*, 33 U.S.C. § 1365(a)(1)(A) (under CWA, citizens can sue a facility "alleged to be in violation" of "an effluent standard or limitation . . . or order"; "effluent standard or limitation" has its own lengthy definition, 33 U.S.C. § 1365(f)). Because EPCRA is not a permitting scheme, unlike the CWA, CAA or RCRA, Congress used language that naturally accompanies reporting requirements – "failure to . . . complete and submit" certain forms – but did not use language that provided jurisdiction over past violations.

The Seventh Circuit also found that the "failure to complete and submit" forms "under" Sections 312 and 313 should be read to incorporate those sections' annual filing dates. Pet. App. A11-A12. The reference to complete and submit forms "under" Sections 312 and 313 is

simply that – a reference to Section 312's inventory form and Section 313's Form R – and not a wholesale incorporation of those sections' requirements. Had Congress intended EPCRA's citizen suit provision to operate differently from its model, it no doubt would have so indicated either in the statute or the legislative history. The Court should not assume that Congress meant to institute a substantive change without explanation.

The Sixth Circuit squarely addressed this language difference by first contrasting the language of Section 326(a) – “failure to . . . complete and submit” – with the requirement in Section 313:

Although § 11023(a) requires submission of Form Rs by a certain date, the citizen suit provision emphasizes the completing and submitting of the forms. This language suggests that only the failure to complete and submit the forms can provide the basis for a citizen suit. While among the provisions of § 11023(a) is the requirement that the form be filed by July 1 for the preceding calendar year, the citizen suit provision speaks only of the completion and filing of the form. The form is completed and filed even when it is not timely filed. . . . We see no basis upon which one must conclude that Congress, when contemplating citizen enforcement suits, intended such a late submission to be the equivalent of a complete failure to submit the information.

*United Musical*, 61 F.3d at 475. The Sixth Circuit then found that, although a few district courts have held that EPCRA authorizes citizen suits for past violations, the language of EPCRA argues against allowing such suits, and it rejected “this rather hypertechnical parsing of the

language of the statutes in favor of the most natural reading of EPCRA, which weighs against allowing citizen suits for purely historical violations.” *Id.* at 476-77.<sup>15</sup> Congress thus preserved its customary prospective implication of environmental citizen suits in EPCRA and limited citizen actions to instances of uncorrected past violations “by emphasizing that it is the failure to submit the requisite forms that gives rise to a citizen action.” *Id.* at 475. Consequently, when CBE filed suit, The Steel Company had no longer “failed” to complete and submit the required forms, and the district court correctly dismissed CBE's suit.

This Court has held that, “In the absence of indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.” *Middlesex County Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 15 (1981) (rejecting claim that the CWA provided an implied remedy for damages). EPCRA's legislative history reveals no intent to allow citizen suits for past violations. An examination of the legislative history of the provisions upon which EPCRA is based also shows that Congress did not want to

---

<sup>15</sup> It could also be argued that an EPCRA citizen suit is proper only where the alleged violator knew of the requirement and yet failed to comply, for example, after receiving CBE's notice letter and either ignoring it or failing to take the significant effort to comply within the 60-day period. A common definition of “fail” is “Fault, negligence, or refusal.” *Black's Law Dictionary* 534 (5th Ed. 1979). One cannot refuse to complete and submit forms if one is uninformed of the requirement.

overburden federal courts with citizen actions if compliance could be achieved during the notice period. *Hallstrom*, 493 U.S. at 28-29. Had Congress thought a citizen remedy for past EPCRA violations appropriate, it could have fashioned such a remedy. This Court should not find an implied one.

Numerous reporting deadlines exist under other environmental statutes, and, if a party receives a citizen notice regarding a failure to report and then complies within the 60-day notice period, there is no citizen suit under the direction of this Court in *Gwaltney*. It does not make sense that Congress, without explicitly mandating such a result, would authorize citizens to sue for past EPCRA reporting violations but not for past violations under other statutes. One absurd result of the Seventh Circuit's decision is that if a facility does not immediately report a release of chemicals into the environment, but does so upon receiving a notice letter, a citizen plaintiff could still sue under EPCRA, but not under CERCLA. See 42 U.S.C. § 11004(a)(1 & 3), § 11046(a)(1)(A)(i) (certain releases require reporting under both EPCRA and CERCLA).

### III. CBE LACKS ARTICLE III STANDING TO SUE FOR PAST EPCRA VIOLATIONS

Congress could not have intended to authorize citizens to sue for past EPCRA violations because Congress may not confer standing to sue where the case or controversy requirement of Article III of the Constitution is not met. *Defenders of Wildlife*, 504 U.S. at 560; *Valley Forge Christian College v. Americans United for Separation of*

*Church and State*, 454 U.S. 464, 474-75 (1982); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy Article III's case or controversy requirement, which is the "irreducible constitutional minimum" of standing, a plaintiff must show that it has suffered an injury-in-fact, that the injury is fairly traceable to the defendant's actions, and that the injury will likely be redressed by a favorable decision. *Bennett v. Spear*, 65 U.S.L.W. 4201, 4203 (March 19, 1997); *Defenders of Wildlife*, 504 U.S. at 560-61. These constitutional limits on the exercise of federal jurisdiction are "founded in concern about the proper - and properly limited - role of the courts in a democratic society." *Warth*, 422 U.S. at 498. "The province of the court is, solely, to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), and not to vindicate the general public interest that the government enforce the laws and that individuals and businesses comply with those laws. See *Defenders of Wildlife*, 504 U.S. at 576.

Article III thus requires that, to invoke the jurisdiction of the federal courts, a plaintiff must "stand to profit in some personal interest." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976). In this case, however, by seeking judicial authority that it may sue for past violations, CBE attempts to pursue a generalized public interest; it has no personal stake in the resolution of its complaint, and thus no Article III standing. The federal courts must reject "appeals to their authority which would convert the judicial process into no more than a vehicle for the vindication of value interests of concerned bystanders." *Valley Forge*, 454 U.S. at 473.

**A. CBE Cannot Establish an Injury-in-Fact Because The Steel Company Was in Compliance with EPCRA When CBE Filed Its Complaint**

CBE cannot establish an Article III injury. In its complaint, CBE did not (and could not) allege that The Steel Company was in violation of EPCRA, only that The Steel Company had in the past not filed certain EPCRA reports. CBE therefore did not seek injunctive relief ordering The Steel Company to come into compliance, but rather sought reimbursement of its attorneys' fees and civil penalties to be paid to the U.S. Treasury. J.A. 11; Pet. App. A25-A26.

In environmental citizen suits, the plaintiff is seeking redress of public rights and does not receive any personal damages (all penalties going to the U.S. Treasury). See *National Sea Clammers Ass'n*, 453 U.S. at 17 (citizen suit plaintiffs seek to enforce environmental requirements as private attorneys general, whose injuries are "non-economic and probably noncompensable.") When The Steel Company filed its reports, CBE's claim of personal injury was cured, and it joined the public at large in having an interest that the Executive take action against any party that has committed past EPCRA violations. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1974) (plaintiff's injury must exist at time complaint is filed); *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (fact of past injury, while presumably affording plaintiff standing to claim damages, does not establish real threat that plaintiff would again suffer similar injury in future to support Article III standing).

**B. Payment of Penalties to the U.S. Treasury or an Award of CBE's Fees Does Not Satisfy Article III's Redressability Requirement**

CBE cannot show an injury, but even if it could, CBE certainly cannot demonstrate redressability. CBE requested the district court to redress its alleged injury as follows: 1) issue a declaratory judgment that The Steel Company had violated EPCRA; 2) authorize CBE to inspect The Steel Company's facility and records for compliance with EPCRA for at least one year; 3) order The Steel Company to provide CBE a copy of all future EPCRA reports for at least one year; 4) order The Steel Company to pay civil penalties of \$25,000 per day for each day of each violation; and 5) award CBE its costs of litigation, including attorneys' fees. J.A. 11.

That a court may impose penalties payable to the U.S. Treasury or issue a declaratory judgment that a defendant violated EPCRA before the complaint was filed does not give a citizen plaintiff a sufficient stake in a case for Article III purposes. By seeking penalties and a declaratory judgment, CBE was not acting on its own behalf, but instead on behalf of the government and the public at large. See *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (private parties have no judicially cognizable interest in the prosecution of another); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (private parties have no judicially cognizable interest in procuring the enforcement of law by an administrative agency). Because it is undisputed that The Steel Company was in compliance before this suit was filed, CBE's only interest was that The Steel Company be called upon to answer for any past violations by paying penalties. Such an interest is no more

than the "undifferentiated public interest" in the "faithful execution" of the country's laws, and is insufficient to confer standing on the citizen plaintiff. *Defenders of Wildlife*, 504 U.S. at 577; *Gwaltney*, 484 U.S. at 70 (Scalia, J., concurring) ("If it is undisputed that the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit.") Just as the payment of penalties does not confer standing, this Court has likewise held that awarding attorney's fees does not constitute sufficient interest in a case for Article III purposes. *Lewis Continental Bank v. Lewis*, 494 U.S. 472, 480 (1990); *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986).<sup>16</sup>

Not only does The Steel Company maintain that CBE has no standing, but the United States also agrees that a past violation cannot confer standing on an environmental citizen suit plaintiff:

A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, at least at the pleading stage, both personal injury and redressability. However, a citizen who brings suit simply to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirements; the mere assessment of civil penalties, which are payable only to the

<sup>16</sup> CBE's other requested relief - that it be authorized to inspect The Steel Company's facility and records and be provided its future EPCRA reports - also amount to no more than a generalized interest in a company's compliance with the law.

Treasury, would not redress in any meaningful sense the citizen's alleged injuries. Indeed, if Congress were to give private citizens untrammelled authority to seek penalties for wholly past violations - oblivious to Article III's requirement that a litigant have a personal stake in the controversy - it would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed" (U.S. Const. Art. II, § 3) and the prosecutorial discretion inherent therein.<sup>17</sup>

The government was rightly concerned by the expansion of citizen suit authority advanced by citizen groups. Citizen suit provisions essentially vest prosecutorial authority in persons who, unlike federal or state authorities, are not limited by constitutional constraints on government and are not accountable to the electorate. As noted in *Gwaltney*, allowing citizens to sue for past violations would also impermissibly intrude upon EPA's enforcement discretion.

That EPCRA authorizes "any person" to bring a citizen suit does not alter the requirement that citizen suits be prospective in nature because inherent in every congressional grant of standing are the constitutional

<sup>17</sup> Brief of the United States as Amicus Curiae Supporting Affirmance at 21 n. 34, *Gwaltney*, 484 U.S. 49 (1987) (citation omitted). The United States urged affirmance arguing that respondents had properly alleged that *Gwaltney* was in violation of its discharge permit, but rightly noted that there is no standing if the violation is entirely past. In the present case, the United States filed an amicus brief and argued to the Seventh Circuit that EPCRA citizen suits would not interfere with EPA's enforcement discretion, but it did not address the threshold issue of whether Respondent has standing.

requirements that a plaintiff suffer a concrete injury and that the injury be redressable by a favorable decision. *See, e.g., Defenders of Wildlife*, 504 U.S. at 560-61. This constitutional core of standing is a minimum requirement which Congress cannot eliminate. *See, e.g., Warth v. Seldin*, 422 U.S. at 498-501. Congress simply cannot create standing by authorizing "any person" to bring an EPCRA action.

That *Defenders of Wildlife* involved a government defendant also does not matter for Article III purposes because a defendant's identity cannot alter Article III's requirements of injury and redressability:

As government programs and policies become more complex and far-reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. . . . Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . In exercising this power, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.

*Defenders of Wildlife*, 504 U.S. at 580 (citations omitted) (Kennedy, J., concurring). If a statute purports to give standing to "any person," without more, this requirement is not met. A would-be citizen plaintiff must establish an injury and redressability, and not merely point to a general congressional statement of standing. *Id.* at 580-81.

Three courts have held, all without analysis, that relief available to EPCRA citizen plaintiffs establishes redressability. *Don't Waste Arizona v. McLane Foods, Inc.*, 950 F. Supp. 972, 980 (D. Ariz. 1996); *Atlantic States Legal*

*Found., Inc. v. Buffalo Envelope Co.*, 823 F. Supp. 1065, 1071 (W.D.N.Y. 1993); *Delaware Valley Toxics Coalition v. Kurz-Hastings, Inc.*, 813 F. Supp. 1132, 1140-41 (E.D. Pa. 1993). These courts cursorily reasoned that because a court can impose penalties payable to the Treasury, issue a declaratory judgment that a party has violated EPCRA, enjoin future EPCRA violations, or award costs of litigation, Article III redressability was satisfied. These courts' shallow analysis, bereft of any constitutional examination, begs the ultimate question: just how do these types of relief, which either do not benefit the EPCRA plaintiff or are simply a by-product of the litigation, satisfy Article III? This Court's Article III jurisprudence shows that they do not.

"Surely Congress did not intend this [citizen suit] provision to be read in a vacuum, without regard to constitutional limitations." *Defenders of Wildlife v. Hodel*, 851 F.2d 1035, 1045 (8th Cir. 1988) (Bowman, J., dissenting), *rev'd sub nom. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Because Congress alone cannot expand the constitutional jurisdiction of the federal courts, which would amount to amending the Constitution through legislation, it could not have intended to authorize citizens to seek penalties for past EPCRA violations.<sup>18</sup> CBE has no standing to sue.

<sup>18</sup> In the CAA Amendments of 1990, Congress revised the authorization for citizen suits under that statute. Pub. L. No. 101-549, 104 Stat. 2399, 2682, codified at 42 U.S.C. § 7604(a)(1) (citizen plaintiffs may sue "if there is evidence that the alleged violation has been repeated.") In his Signing Statement, President Bush noted that, "As the Constitution requires, litigants must show, at a minimum, intermittent, rather than

#### IV. COMPLYING WITH EPCRA TAKES MUCH MORE THAN A "MINIMAL EFFORT"

The court below latched onto two other reasons to conclude that citizens should be allowed to sue for past violations. First, the Seventh Circuit concluded that if the Sixth Circuit in *United Musical* were correct, "citizen suits could only proceed when a violator receives notice of intent to sue and still fails to spend the minimal effort required to fill out the forms and send them in." Pet. App. A14. The Seventh Circuit reasoned therefore that citizens would have no reason "to incur the costs of learning about EPCRA." *Id.*

Contrary to the court's assertion, completion of EPCRA forms is no simple matter. It is also a more laborious matter for those companies, especially small businesses like The Steel Company, that cannot assign personnel to deal solely with environmental compliance. Completing the forms, especially the Section 313 Form R, requires the collection and computation of detailed information regarding a company's operations and practices. EPA itself estimates the public reporting burden for Section 313 familiarization, compliance determination, calculation, completion and recordkeeping to be 124.5 hours in the first year, 61 Fed. Reg. 33588, 33617 (June 27, 1996), or over three working weeks for a single employee, not

---

purely past, violations of the statute in order to bring suit." Reprinted in 1990 U.S.C.C.A.N. 3887-1, 3887-2. Interpretation of the CAA is obviously not before the Court. However, one point is clear: Congress did not amend EPCRA when it amended the CAA.

considering that employee's other duties, including compliance with other environmental laws, hardly a simple matter.

The completion of Section 312 forms also requires collection and recording of detailed information. The reporting of chemical mixtures may further complicate reporting.<sup>19</sup> See 40 C.F.R. § 370.40-41 (if a chemical is part of a mixture, a party may report "either the weight of the entire mixture or only the portion that is a particular hazardous chemical. . . .") EPA admits that even its rule explaining how to calculate chemical mixtures under Section 312 "may have confused the regulated community. . . ." *Confusion About EPCRA Rule Acknowledged*, Chem. Reg. Rep. (BNA), Aug. 17, 1990, at 802. EPA estimates that there are over 500,000 chemicals or products which are subject to the Section 312 reporting requirements. *Title III List of Lists: Consolidated List of Chemicals Subject to EPCRA*, EPA, June 1994, at 1 n. 1. And EPA attributes many EPCRA compliance problems to "gray areas in the law" that make reporting requirements confusing for both EPA and industry. *EPA Eyes Changes to EPCRA Regulations to Clarify 'Gray Areas,' Increase Compliance*, Toxics Law Rep. (BNA), March 9, 1994, at 1132.

Because of EPCRA's complexity, companies that receive an EPCRA notice letter may not be able to easily comply and submit the required forms within the 60-day notice period. To those companies, including The Steel Company, whose regulatory burden is great and whose

---

<sup>19</sup> EPA has not provided the regulated community with an estimate of the public reporting burden for Section 312 compliance.

resolve to cure a violation is strong, Congress offers an opportunity to come into compliance during the 60-day period, thus avoiding a citizen suit and leaving to EPA's "broad perspective" whether enforcement is truly necessary. This makes EPCRA no different from other environmental statutes where, if a violation is cured within 60 days, citizen enforcement is barred.

Moreover, should a company simply "throw" reports together after receiving a citizen notice of intent to sue, it opens itself up to a wide range of civil and criminal penalties. First, EPA considers the submission of incomplete forms to be serious violations, which can result in penalties as high as \$16,500 per day. Section 312 Policy at 15-20; Section 313 Policy at 11-12. Moreover, in addition to running the risk of civil penalties for filing incomplete forms, a company also runs the risk of criminal prosecution for submitting false information. 18 U.S.C. § 1001; Section 313 Policy at 7; *see also United States v. Murphy*, 935 F.2d 899, 900 (7th Cir. 1991) (18 U.S.C. § 1001 makes it a criminal offense to submit false information required by a federal statute to a state agency; thus, a party that submits false Section 312 forms to state or local agencies could be prosecuted under 18 U.S.C. § 1001.)

Second, the court below ignored the traditional operation of environmental citizen suit provisions and instead chose to guarantee EPCRA citizen plaintiffs recovery of their costs and attorneys' fees. EPCRA is no different, however, from other environmental statutes in that Congress did not guarantee citizens recovery of their costs of identifying alleged violators. A citizen group always faces the possibility that a party will be able to cure the alleged violation before the group files suit, the result

that Congress no doubt sought as the citizen group's primary goal, not the advancement of litigation. Likewise, if the government pursues a violator before the notice period expires, the citizen plaintiff is barred from suing and thus cannot recover its costs. Affirming the Seventh Circuit's decision would guarantee EPCRA plaintiffs the possibility of recovering their costs in any EPCRA suit, however trivial, a result that Congress could not have intended. The goal of the citizen group is achieved with compliance, even though at a small cost for posting the notice.

#### V. NOTHING INDICATES THAT CONGRESS INTENDED CITIZENS TO HAVE UNBRIDLED DISCRETION TO DETERMINE WHEN TO BRING ACTIONS FOR CURED PAST VIOLATIONS

Because reporting, rather than substantive, violations are the easiest to prove, citizen groups readily file suits alleging this kind of violation. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tulane L. Rev. 339, 365-66 (1990). Some observers have found that, "Enforcement proceedings brought for violations of the voluminous paperwork requirements of the Clean Water Act generate tens of thousands of dollars in attorneys' fees but no discernible environmental benefits." *Id.* at 366. This lack of environmental benefit is even more pronounced under EPCRA because EPCRA does not restrict the use or disposal of any substance; it is simply a reporting statute.

Even enforcement attorneys at EPA find that filing EPCRA citizen suits is "a rewarding and lucrative practice area for private attorneys general. . . . The large number of EPCRA citizens suits may be because paperwork violations are relatively easy to prove when compared to other more substantive violations, and because EPCRA is a strict liability statute." Michael J. Walker & Jon D. Jacobs, *EPCRA Citizens Suits: An Evolving Opus with a Discordant Note*, *The Journal of Environmental Law & Practice*, Jan./Feb. 1997, at 20.<sup>20</sup> The authors explain why EPCRA litigation has been such a fertile ground for citizen groups:

[C]itizen suits were first used extensively under the CWA. This probably would not have been the case had EPCRA also been in existence at that time, because EPCRA is much simpler to use from a litigation point of view. The statute is well written; the issues are generally clear-cut; the suits are inexpensive, require minimal expert testimony, and usually can be resolved on a summary determination without the need for a trial or evidentiary hearing.

*Id.* at 14.

If the Seventh Circuit is affirmed, the federal courts will experience a deluge of EPCRA citizen suits, contrary

<sup>20</sup> Mr. Walker is the Senior Enforcement Counsel for Administrative Litigation in EPA's Office of Enforcement and Compliance Assurance. Mr. Jacobs is a Branch Chief in EPA's Office of Enforcement and Compliance Assurance's Toxic and Pesticides Enforcement Division. The authors note that the opinions in their article are personal views and not necessarily those of EPA.

to Congress's concern that the federal courts not be flooded with unnecessary citizen actions. Not only will citizen groups be able to sue if a company, like Petitioner, achieves compliance within the notice period, but a citizen group will also be able to search old government records to determine which companies filed late EPCRA reports and then sue. Consider the situation of a small manufacturer, in compliance with numerous environmental, health and safety requirements, but not in compliance with EPCRA because it is uninformed about EPCRA. The company then discovers it is subject to EPCRA and submits the required reports. A year or two later, in searching government records, a citizen group finds the company's EPCRA filings and sends an EPCRA notice. If the company does not settle on the terms demanded by the citizen group, it must defend a lawsuit in federal court. Moreover, if suit is filed, the citizen group is certain to prove liability. Like other environmental statutes, EPCRA is a strict liability statute, and, under the decision below, an EPCRA reporting violation, even if cured, is always sufficient to allow the citizen to sue in federal court. The citizens group has an ironclad lawsuit and will seek to recover its fees as the "prevailing party." 42 U.S.C. § 11046(f).

Congress could not have intended to permit citizen groups to exhume past violations and then bring penalty actions based on those violations. Yet citizen groups will have that authority if the Seventh Circuit is affirmed. Such actions do not abate any violation, the violation already having been corrected. Nothing is gained by such a suit (with the exception of the citizen group possibly recovering attorneys' fees). A party's resources will be

consumed defending an unnecessary lawsuit – resources that could be used to invest in new plant and equipment, creating jobs and benefiting the community.

Citizen groups therefore have seized upon EPCRA as a fail-safe, guaranteed funding mechanism. One such group, Don't Waste Arizona, has sent over 90 EPCRA notices to companies in Arizona since 1992, filed at least 12 complaints in federal court, settled with several companies before filing suit, and has yet to resolve its disputes with another 40.<sup>21</sup> *Nonprofit Cashing in on Lawsuits*, The Business Journal-Phoenix, June 21, 1996, at 1, 38. Because proving EPCRA violations is no difficult task, the head of Don't Waste Arizona:

has latched onto another strategy to pay his bills: He sues unsuspecting small businesses and forces them to meet stringent Environmental Protection Agency guidelines that most didn't even know existed. . . .

*Id.* at 38.

Given the prospect of potentially ruinous penalties for what is an easily-proved strict liability offense, in addition to a possible award of a plaintiff's attorney's fees, business entities invariably find themselves compelled to yield to the citizen group's demands. The judicial extension of citizen suit jurisdiction to past violations makes this practice so lucrative because there is nothing a defendant, having already achieved compliance, can do to defeat the plaintiff's action. Citizen groups thus have

---

<sup>21</sup> Don't Waste Arizona is one of the ten citizen groups that joined in an *amicus* brief in support of CBE's appeal to the Seventh Circuit.

enormous leverage, with little to lose and much to gain, simply by reviewing government records to determine which companies are easy litigation targets.

Protection of health and the environment through strong public and private commitments is today part of the accepted and essential goals of government, business and the public. The vitality and success of environmental protection benefit all people, but a balanced and reasonable response to those who strive to comply with the numerous and complex regulatory requirements should not be lost in the zeal to enforce those requirements. The Steel Company, like most U.S. business, seeks to comply with the law and does so. When it received notice of EPCRA violations, it quickly responded within the statutory notice period for cure. To insist that its response fell short, and that citizens can sue for wholly past violations, disserves the spirit whereby the regulated community today seeks to be a partner, not a recalcitrant, in the successes of environmental protection. Citizen enforcement, while important, should not be accorded greater significance than intended by Congress.



**CONCLUSION**

The judgment of the Seventh Circuit Court of Appeals should be reversed, and the District Court's dismissal of CBE's complaint should be reinstated and affirmed.

Respectfully submitted,

SANFORD M. STEIN  
*Counsel of Record*

LEO P. DOMBROWSKI  
WILDMAN, HARROLD, ALLEN & DIXON  
225 West Wacker Drive  
Chicago, IL 60606-1229  
(312) 201-2000  
*Counsel for Petitioner*